

a combined customer base and marketing efforts in both the U.S. market and Country X. As a result, the U.S. provider would be placed at a distinct and unfair cost disadvantage vis-a-vis its counterpart from Country X. The anticompetitive impact is equally onerous if a government restricts "foreign content," but defines it to include programming produced or owned by a foreign entity (e.g., a foreign broadcaster) or produced in a foreign country.

It is important to note that the deleterious effects on competition would be caused not by superior marketing skills on the part of the foreign programmer/operator or the quality or innovative nature of its services, but by the artificial barriers constructed by protectionist policies giving it an unfair advantage in the provision of DBS/DTH services in its home market.

The Commission should make clear that consideration of content limitations will be a critical market component of the ECO-Sat test for DBS/DTH services in light of the high potential for competitive distortion resulting from restrictive (or preferential) content requirements in the home market.²¹

²⁰(...continued)

programming into Country X. Thus, advertising revenues would decline and it would, again, be at a competitive disadvantage vis-a-vis Country X satellite operators.

²¹ It is particularly important for DBS/DTH that applicable content restrictions or preferences be considered as part of the ECO-Sat test because DBS/DTH services generally fall outside broadcast or common carrier service regulation. See, In re Application of CBS, et. al., 92 F.C.C. 2d 64, 92 (1982). (DBS Order). International common carrier services offered over satellite (as well as terrestrial) facilities are subject to the Section 214 ECO test, which protects U.S. competition from the harmful effects of foreign market power abuses. Market Entry Order, 11 F.C.C. Rcd. 3873, 3881-3920 (1995). Broadcast services are subject to foreign ownership restrictions and other legalities designed to protect the public trust. However, in keeping with its goal to encourage development of services on DBS, the Commission has imposed minimal regulatory requirements on DBS services. See, infra, fn. 22; DBS Order, 92 F.C.C. 2d 64, 92 (1995); and 47 C.F.R. Sections 100.1-100.17.

- c. **The Commission should review the actual or planned implementation and enforcement of regulatory changes relevant to satisfaction of the ECO-Sat test, as well as the competitive impact of foreign license fee or auction results.**

As already noted, MCI agrees with the Commission that factors such as the fairness and transparency of the regulatory regime and other relevant considerations should be part of the ECO-Sat test, because these limitations may serve as de facto barriers that have the effect of distorting competition. (NPRM, para. 41). MCI also concurs that there is no need, at this juncture, to attempt to create an exhaustive list of de facto barriers that could affect the ability of a U.S. satellite provider to compete in a foreign market. (*Id.*) Nonetheless, in addition to the transparency and openness of the applicable regulatory regime, there are two important considerations that the Commission should routinely review in conducting its ECO-Sat analysis. First, the Commission should determine whether the regulatory authorities in the relevant foreign market are implementing and enforcing the laws, regulations and policies that, on their face, appear to satisfy the ECO-Sat test for a particular service or services..

Second, the Commission should evaluate whether granting an earth station license for use of a foreign satellite would place U.S. satellite operators at an unfair competitive disadvantage or cause market distortions in cases where the U.S. operator has been required to obtain the license at auction in accordance with Commission policy. A U.S. satellite system operator obviously would not have the ability to operate on a level playing field with the foreign satellite operator if only the U.S. operator were required to pay a substantial fee for the right to use U.S. spectrum by means of an auction process.²² For this reason, the impact should be considered as part of the

²² There may be other requirements that the Commission has imposed on U.S. space station licensees that, in fairness to U.S. operators or due to public interest concerns, ought also
(continued...)

ECO-Sat. The effect on future auctions should also be considered as part of the public interest evaluation, because applicants who perceive that there is “free rider” potential will be encouraged to forum-shop among foreign administrations, rather than pursue an orbital location or space segment license from the U.S. government at auction.

- d. **The Commission should clearly define “de jure” consistently with MCI’s recommendation and place the full burden on the applicant to demonstrate that granting its application is in the public interest.**

Under the Commission’s formulation, the determination of which party bears the burden of demonstrating that there is or is not a relevant constraint depends upon whether that restriction falls within one or the other of two categories -- de jure or de facto. Thus, the Commission should provide a clear delineation of the types of de jure restrictions which applicants address in their application.²³ At a minimum, the Commission should specify that the applicant has the burden of demonstrating the absence of the de jure barriers which MCI has identified above in sections III.C.4.a-b (including applicable content restrictions in the case of DBS/DTH services). The Commission also should clarify that the applicant bears the burden of demonstrating that grant of its application is in the public interest.

²²(...continued)

to be imposed on earth station licensees. For example, the Commission has requirements for DBS assignees, such as service to Alaska and Hawaii. Since this is unlikely to be a condition of the foreign satellite license, the Commission should require that the earth station licensee accept these responsibilities itself or, provide the licensee the option of producing a contract wherein the space station licensee accepts these responsibilities.

²³ “De facto” constraints would simply be defined as those that are not “de jure, i.e., ” those which have an indirect legal impact on competition in the satellite services in question, as well as practices or procedures which have the same effect.

Although MCI agrees that the identification of de facto barriers can reasonably be left to the opponents of an application (NPRM, para.42), it is clear that the information regarding the particular conditions and circumstances surrounding a transaction are often uniquely within the knowledge of the applicant and its business associates participating in the transaction. Thus, the party opposing the application should be required to produce sufficient evidence to support a prima facie showing that a de facto barrier exists, after which the applicant should have the burden of demonstrating that the alleged barriers do not exist or, alternatively, that they do not have the effect of limiting “effective competitive opportunities for U.S. suppliers” in the appropriate market(s).

A final procedural issue concerns the NPRM proposal that other U.S. satellite licensees file information on countries which have permitted them to provide certain satellite services. This information could then be used by applicants as a “prima-facie case” that there is no de jure restriction against a U.S. satellite operating in that country. MCI questions whether such a list is likely to be of much value, because some countries allow use of U.S. facilities for incidental traffic or in emergencies, but are otherwise closed to U.S. satellite providers.²⁴ Further, it would be unreasonable to impose the burden on U.S. satellite licensees to compile and submit this data, especially when it is likely to contain competitively sensitive information. The benefits of accessing the U.S. market from a foreign satellite accrue to the applicant and, thus, the burden of providing a legal analysis of the openness of the home and route markets should also be imposed on that entity.

²⁴ If the Commission decides to adopt such a measure, it should at least insist on a service-specific breakdown by country, and allow applicants to use the list only if the service they propose to offer is covered.

5. Modified Application of the ECO-Sat Test to MSS or Other Services

MCI takes no position on the issues raised in Section III. C.5. at this time, but will review the comments filed by other parties and address these issues in reply comments as appropriate.

D. Consideration of Additional Public Interest Factors Is Critical to the ECO-Sat Test

The Commission proposes to examine other factors that bear on whether the grant of an earth station license application for use of a foreign satellite is in the public interest, convenience and necessity, consistent with the Communications Act. Specifically, the Commission will consider factors such as the general significance of the proposed entry to the promotion of competition in the United States and the global satellite service market, issues of national security, law enforcement, foreign policy and trade. MCI acknowledges that these are important public interest concerns that must be addressed in the licensing process.

Clearly, the fact that spectrum and orbital locations are limited resources magnifies the long-term impact of making public policy decisions. For example, BSS (DBS) resources are generally allocated at present to individual countries. The U.S. may allow a foreign operator to enter the U.S. market based on a finding that the operator's home regime affords U.S. operators effective competitive opportunities. However, even if, over time, the spectrum resources of the "excess" foreign satellite capacity is used predominately to reach U.S. customers, the satellite slot is likely to remain permanently within the regulatory domain of the foreign administration. This may effectively preclude U.S. operators, in cooperation with the U.S. government, from seeking modifications to the ITU BSS plan for the purpose of reallocating this "excess" spectrum to meet other U.S. needs, such as the delivery of local programming via satellite. But such regulatory

flexibility may be important in the future to assist in making DBS a more effective competitor to cable in the U.S. multichannel video program distribution marketplace.

Thus, future evolution of spectrum policy and needs is an important public interest consideration, especially when there could be a substantial impact on competition within the United States.

E. Other Technical and Legal Requirements

1. Communications with Non-U.S. Licensed Satellites Should Be Subject to the Commission's Existing Technical Rules.

The Commission has proposed to apply the substantive technical requirements of Part 25 of its rules to non-U.S. satellite operators in the C-band and Ku-band. MCI agrees that the Commission should require non-U.S. satellite operators to comply with these requirements. MCI urges the Commission to require those operators to comply, as well, with the requirements contained in Part 100 (Direct Broadcast Satellite services) and other technical requirements in effect but not yet codified in the Code of Federal Regulations.

2. No Major Changes Are Needed in Existing Foreign Ownership Restrictions.

The Commission has tentatively concluded that its proposal to require earth station licensing for communication with non-U.S. satellites will not, as a general matter, impose any significant limitations on foreign investment in space stations that provide service within the U.S. (NPRM, at paras. 58-59). MCI agrees with the Commission's assessment.²⁵

²⁵ MCI reiterates its request that the Commission review Section 100.11 of its rules, as applied to non-broadcast, non-common carrier DBS system licenses. As explained in MCI's DBS application (FCC File No. 73-SAT-P-96) and MCI's April 15, 1996 consolidated opposition to various petitions and comments on that application, this "interim" DBS foreign ownership rule, insofar as it applies to DBS authorizations that are
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3. **The Earth Station Application Form Will Require Only a Few Minor Changes.**

In paragraphs 60-61 of the NPRM, the Commission seeks comments on changes which should be made to the earth station license application form, FCC Form 493. MCI's current view is that the Commission need only make modest changes to the form itself in order to accommodate the formalized ECO-Sat test. MCI recommends that the Commission add a question, or modify an existing question, to solicit a "yes" or "no" response on whether the application is one for authority to communicate with a non-U.S. licensed satellite. A "yes" response would trigger a requirement, described in detail in the form instructions, to attach a series of exhibits containing the information described in paragraphs 60-61 of the NPRM (to the extent it is not already on file with the Commission) i.e., identification of the satellite, the country of license, ownership of the satellite, list of "route markets," a showing that U.S. satellite operators face no de jure barriers in the home market or relevant route markets, a showing that grant of the license would be in the public interest, and a showing that the non-U.S. satellite meets applicable technical, financial and legal requirements.

F. Intergovernmental Organizations and Affiliated Companies

MCI takes no position on the issues raised in Section III. F. of the NPRM at this time, but will review the comments filed by other parties and address them in reply comments as appropriate.

²⁵(...continued)

neither "broadcast" nor "common carrier," is neither authorized by statute nor consistent with Commission precedent governing subscription services.

G. Blanket Licensing of Receive-Only Earth Stations Receiving Signals From Non-U.S. Licensed Satellites Is Both Necessary and Appropriate.

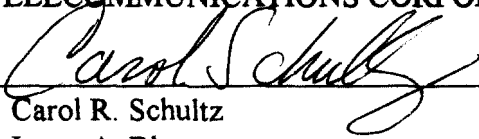
In the NPRM, the Commission seeks comment on whether, in light of the proposed framework, it should continue to require licenses for receive-only earth stations that receive signals from Intelsat satellites and non-U.S. licensed satellites, and transmissions via U.S.-licensed satellites originating in foreign countries. As the Commission has indicated, it is necessary, for both technical and competitive reasons, for it to retain the authority to regulate and license transmissions into the United States as necessary. MCI agrees that, as a general rule, there is no need to license individual receive-only earth stations for the reception of signals from U.S.-licensed FSS satellites, regardless of the country of origin of those transmissions. MCI also agrees that, for DTH/DBS, blanket licensing of multiple, technically identical receive-only terminals, as outlined in para. 80 of the NPRM, would provide adequate regulatory oversight (as well as regulatory parity) if applied to all systems, without regard to whether they utilize FSS or BSS (DBS) spectrum. Continuation of licensing is critical for such earth stations for all of the reasons discussed herein. Further, regulatory oversight may become even more important given the continuing evolution of the satellite industry and the prospects that future technological developments (perhaps including the utilization of hybrid or collocated FSS and BSS satellites to offer interactive multimedia services) may erode the distinctions between the current receive-only and VSAT (two-way very small aperture terminal) earth station categories.

CONCLUSION

In conclusion, MCI applauds the Commission for its thoughtful and comprehensive analysis of the measures that are necessary to continue to ensure that effective competitive opportunities are available to U.S. satellite operators abroad. MCI urges the Commission to consider the additional recommendations set forth in MCI's comments in fashioning its policy and rules concerning the licensing of earth stations within the U.S. for communications with non-U.S. satellites.

Respectfully submitted,
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Dated: July 16, 1996

CERTIFICATE OF SERVICE

I, Sandy T. Streek, hereby certify that a true copy of the foregoing "Comments" was served this 16th day of July, 1996, by hand delivery or first class mail, postage prepaid, upon each of the following:

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